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**This Opinion is Not
Citable as Precedent
of the TTAB**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re RelaxStation Ltd.

Serial No. 76402644

Satch U. Ejike, Esq. for RelaxStation Ltd.

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Before Seeherman, Hohein and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

RelaxStation Ltd. (applicant) has applied to register
the mark shown below for "massage therapy to ease sore and
aching bodily joints, muscles, and feet, through natural
non-medical relaxation procedures," in Class 44.



The application, filed on April 30, 2002, is based on applicant's allegation of use of the mark in commerce, and asserts March 23, 2002 as the date of first use of the mark and April 17, 2002 as the date of first use of the mark in commerce.

Registration was finally refused by the examining attorney, under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of the registration of the mark RELAXATION STATION for "body, head and neck massage services," in Class 42. Registration No. 2220094 issued January 26, 1999; an affidavit of continuing use has been filed under Section 8 of the Trademark Act, 15 U.S.C. § 1058.

In presenting their arguments on likelihood of confusion, applicant and the examining attorney discuss different authorities, although the factors considered by the respective authorities largely overlap.¹ The *Du Pont* factors govern our analysis of likelihood of confusion in this case. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). For a recent

¹ Counsel for applicant apparently practices within the jurisdiction of the United States Court of Appeals for the Sixth Circuit and has discussed likelihood of confusion factors analyzed in that circuit.

restatement of these factors, see In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities or differences between the marks and the similarities or differences between the respective goods or services.

Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and services] and differences in the marks"). Further, when the goods or services in an application and a cited registration are virtually identical, as in this case, it has been held that the marks need not be as close as they might otherwise have to be to support a finding of likelihood of confusion. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Having alluded to the overlap in the identified services, we will now consider them, the classes of consumers for such services and the channels of trade for marketing such services, to the extent there is any evidence of record on these factors. In doing so, we must focus on the services as identified in the involved

application and registration. See In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (internal quotation marks omitted) ("Indeed, the second DuPont factor expressly mandates consideration of the similarity or dissimilarity of the services as described in an application or registration"). Applicant appears to stress that its services involve massage of "joints, muscles, and feet" while registrant's services involve massage of the "body, head and neck." This, however, is a distinction only in semantics and we find the respective massage services, based on the involved identifications, to clearly overlap. This is so despite applicant's listing of its services as therapeutic in nature, for registrant's identification is not limited in any way and must be read to include therapeutic massage of the body, head and neck.

As for the classes of consumers, in this case, there are no restrictions in either identification and both applicant and registrant must be presumed to market their massage services to all possible consumers of such services. Thus, both applicant and registrant are presumed to offer their services to the general public. Applicant stresses that it is located in Ann Arbor, Michigan and asserts that registrant's services are provided only in San Francisco and, therefore, there is no overlap in consumers.

We note, however, that there is nothing in the record regarding the geographic area in which registrant offers its services and that the examining attorney is correct in observing that the registration of registrant's mark on the Principal Register constitutes "constructive use of the mark [as of the filing date of the underlying application], conferring a right of priority, nationwide in effect." See Section 7(c) of the Trademark Act, 15 U.S.C. §1057(c). Thus, it is inapposite that applicant has stated that it has not offered its services outside Ann Arbor and has no plans to do so in the future.

As to channels of trade through which the applicant and registrant may market their services, we note again that neither identification contains any restrictions, and the services must be presumed to be offered in any manner typical for such services. This would obviously include not only offering the services in physical locations established by applicant or registrant but also might include rendering of services at athletic events, perhaps in spas or hotels, or in any location in which potential customers for massage services may be found.

In sum, for purposes of our analysis, the services, classes of consumers and channels of trade overlap. One

final point relative to the services and classes of consumers, however, remains to be considered.

Applicant argues that when services are "personal" in nature the consumer is "ordinarily ... discriminating and sophisticated." We have nothing in the record regarding the cost of either applicant's or registrant's services, the type or style of massage offered, or the length of time involved in receiving a typical massage from applicant or registrant. Since massages can vary in type, length and price, there may be circumstances in which prospective customers would be deliberative and discriminating, carefully weighing cost and skill of the masseur; but there may also be circumstances in which prospective customers might be offered quick, less-expensive massage services and may be more impulsive in their purchasing decisions with less concern for the credentials of the masseur.

Moreover, even if we assume the respective customers to be discriminating, we would not conclude, on that factor alone, that there would be no likelihood of confusion. When legally identical services are marketed under, as we discuss below, very similar marks, even careful or discriminating consumers may be confused. Weiss Associates

_____, 902 F.2d 1546, 14 USPQ2d 1840
(Fed. Cir. 1990).²

Turning to a comparison of the involved marks, applicant argues at length that the marks are significantly different, but we find to the contrary.

First, applicant argues that it is particularly significant that it uses a stylized font and a design element in its mark. However, when a mark is registered in typed form, as is the RELAXATION STATION mark in the cited registration, the registration of the typed mark is not limited to any particular font and we must consider all reasonable forms of display in which the mark may be presented. Phillips Petroleum Co. v. C. J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35 (CCPA 1971). We find that the font used in applicant's stylized presentation of the term RELAXSTATION would be a reasonable form of display for the registered mark RELAXATION STATION. Accordingly, in our analysis of likelihood of confusion, we consider that the marks may look very similar, at least apart from applicant's design element.

² Applicant has acknowledged that consumers may not have the opportunity to compare the marks side by side and may have a vague or general recollection of each. We agree and find that this circumstance, too, means that even sophisticated consumers might be confused when seeing the marks at different times.

Second, we do not find that the design element in applicant's mark is significant enough to avoid a likelihood of confusion. The application refers to the design element as a "coiled spring whose tension unwinds into a smooth spiral."³ Many consumers may simply perceive the design element as stylized underscoring for the words. In any event, the words RELAXSTATION clearly dominate the mark, visually and in terms of the commercial impression created. See *Dixie*, 41 USPQ2d at 1534 (Applicant's addition of design element and generic term to registered mark did not create a different commercial impression).

Third, we find the marks similar in sound. While the total number of syllables in registrant's mark is greater, the "-ATION" portion of RELAXATION rhymes with the STATION portion of registrant's mark and may serve more to emphasize the sound of STATION than to differentiate the words RELAX and RELAXATION. When spoken, the additional syllables in registrant's mark will not be a clear and obvious way to draw a distinction between the two marks.

Finally, and most significantly in this case, we find the marks to create virtually identical commercial

³ This has not been included in the application as a description of the mark and appears under the section of the application form entitled "specimen description"; however, it suggests what applicant considers the design to represent.

impressions. Each mark, considered in conjunction with the identified services, creates the impression of a place where one can relax, i.e., experience relaxation, through massage. We rely on the presumptive similarity in forms of display, similarity in sound and the virtually identical connotations of the marks to reach our conclusion that the marks are very similar for likelihood of confusion purposes. In re Sarkli, Ltd., 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983) ("the [USPTO] may reject an application ex parte solely because of similarity in meaning of the mark sought to be registered with a previously registered mark").

Applicant has argued that RELAXATION STATION is either a generic term or so highly descriptive that it cannot acquire distinctiveness as a mark.⁴ In support of this assertion applicant recites a list of purported other uses of RELAXATION STATION and lists Internet web sites where these other uses can be found. Applicant has not, however, provided copies of these web sites, so the record is devoid of any evidence on which applicant might rely to argue that

⁴ Applicant acknowledges that a mark registered on the Principal Register is presumed not to be descriptive. Brief, p. 6, n. 5. Nonetheless, applicant has strenuously argued that registrant's mark is entitled to no more weight in comparing the marks than is a generic term. We remind applicant that an ex parte proceeding is not the proper forum for such a challenge to a registered mark. See *Dixie*, 41 USPQ2d at 1534-35.

the registered mark is so commonly used or registered as to warrant only a narrow scope of protection. Accordingly, we reject applicant's contention that "*Relaxation Station's* generic value encroaches on *RelaxStation's* fanciful and stronger value" so that applicant's mark "should enjoy greater protection" than the registered mark. Brief, p. 7. Moreover, we agree with the examining attorney that, even if we were to assume registrant's mark was weak and entitled to a narrow scope of protection, it is entitled to be protected against registration of a very similar mark (virtually identical in commercial impression), for the same services.

One final point to address is applicant's contention that there have been no instances of actual confusion. Of course, as applicant has noted, its services have been rendered in a very limited geographic area, and those of registrant may likewise have been rendered in a limited, and different, area. Thus, there is nothing in the record to indicate that there have been any opportunities for instances of actual confusion to occur. Accordingly, this factor is entitled to no weight.

Decision: The refusal of registration under Section 2(d) of the Trademark Act is affirmed.